



SACRAMENTO, CALIFORNIA
MONDAY, JANUARY 5, 1998, 8:02 A.M.

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THE DEFENDANT: Your Honor, before these proceedings begin, I would like to revisit the issue of my relations with my attorneys. It's very important. I haven't stood up because I am under orders from the marshals not to stand up. (Pause in the proceeding.)

THE COURT: I want to talk to the marshal.

(Discussion off the record between the Court and a marshal.)

THE COURT: Since my courtroom is full of people, my inclination is to invite the defense side to my chambers with the reporter.

Government?

MR. CLEARY: Can I have one minute, Your Honor?

THE COURT: Yes.

(Discussion off the record among the Government's counsel.)

MR. CLEARY: No objection, Your Honor.

(An ex parte and in camera discussion, consisting of pages 3543-3602, was held and reported under seal by order of the Court.)

SACRAMENTO, CALIFORNIA
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(Open court.)

THE CLERK: Court is now in session.

Criminal S-96-259, United States versus Theodore Kaczynski.

THE COURT: Please state your appearances for the record.

MR. CLEARY: Robert Cleary, Steven Lapham and Stephen Freccero for the government.

MR. DENVIR: Quin Denvir, Judy Clarke and Gary Sowards for Mr. Kaczynski, Your Honor.

THE COURT: Thank you. As you know, the trial in this matter was scheduled to commence this morning at 8:00 a.m. But in lieu of the trial commencing, I conducted proceedings ex parte and in camera, which have not been completed. We hope that those proceedings will be completed or resolved by Wednesday morning.

There's a possibility that the proceedings will not be resolved by Wednesday morning and that the Court would have to conduct other types of proceedings. So I thought I should take the bench and explain the status of the matter and get input from the government.

But let me say something before the government provides input. I realize the government is prepared to go forth with witnesses, and you have made arrangements. We could proceed as though the trial is to commence on Wednesday with the understanding that there's a possibility that it won't commence on Wednesday. Or we could proceed with the understanding that it will commence on Thursday.

If we proceed in that vein, the trial should commence on Thursday. Otherwise, we will be involved in other types of procedures.

Have I said anything that causes the defense to want to respond before I get the Government's input?

MR. DENVIR: No, Your Honor.

MR. CLEARY: Your Honor wants input from the government as to whether we would prefer to schedule for Wednesday or if we would rather schedule for Thursday, is that the question?

THE COURT: That is the question. I think that the government perhaps understands the problem.

MR. CLEARY: We do, Your Honor.

THE COURT: All right.

MR. CLEARY: If I can have one minute to consult with some people in the courtroom?

THE COURT: That would be fine.

(Informal recess.)

MR. CLEARY: Thank you, Your Honor. From the Government's perspective, given that we have flown witnesses here from the East Coast, it creates some scheduling difficulties for us, as I think you can appreciate.

If I could suggest this. The government would be prepared to proceed on either Wednesday or Thursday, at the Court's convenience, with the understanding that for the convenience of witnesses who traveled a great distance, that after a handful of witnesses, probably seven or eight or nine witnesses, somewhere in there, we might not be able to pick up again until the following Monday, until a week from today.

Would that be acceptable to the Court?

THE COURT: How about the defense?

MR. DENVIR: That's certainly acceptable, Your Honor.

THE COURT: Should I have my staff communicate with the jurors to ascertain whether the jurors are available for a longer trial day? If the jurors are available for a longer trial day, then we can extend the trial day.

I recognize that during voir dire I promised the jurors that they would only be in trial until 1:00 o'clock daily. However, since they won't be in trial for a couple of days, maybe there won't be any objection to a longer trial day, at least for Wednesday and Thursday, or if it turned out to be Thursday, then Thursday and Friday.

Is that a viable option?

MR. CLEARY: That would be fine with the government, Judge. We'll do, obviously, whatever you want on that. My only concerns about that are twofold.

One, during the voir dire, we did ask a number of jurors about job problems that they may have. I'm not sure if those jurors are now in the pool, but there were some who were planning on going to work. So we want to find that out, number one.

In my own view, for whatever it's worth, I think it would be good to give the jurors a very, very set schedule. Try to start them at 8:00 o'clock each day and finish at 1:00 o'clock. I'm concerned a little bit if we start telling them that for a few days we'll be going a little later. They may get the wrong message of what's going on here.

But that's our concern. Whatever the Court wants to do is fine.

THE COURT: Well, it wasn't a question as to what I wanted to do. I was only suggesting an alternative. But if you are not in favor of that alternative, I won't pursue it, because it is clear that I did make a promise to the jurors that we would be out of here by 1:00 o'clock daily. If that indicates to you that perhaps I shouldn't approach the jurors, I won't.

MR. CLEARY: I think it would be best not to approach them, Your Honor.

THE COURT: Okay. Anything further to cover then?

MR. CLEARY: Just one request. From the Government's perspective, Your Honor, we seem to be in the same position or an analogous position to where we were a week or so ago with ex parte conferences going on. I would ask the Court again

to keep our request in mind as you decide what portions if any of the ex parte conference transcripts to disclose to the government.

To emphasize, as we said before, our interest is not in getting or obtaining any attorney-client communications or seeing any sort of strategy sessions that went on in chambers. But we do have a very real and a very serious interest in protecting the record in this case for appeal, and also to discharge our obligation to advise the Court as to what steps the Court should take, which may include advice from the Government that the Court needs to question the defendant personally, and we may be able to suggest some questions that you should pose to the defendant or his counsel.

I only state that so the Court will keep that in mind as you decide which portion if any to disclose to us.

Thank you.

THE COURT: I am aware of the Government's interest, and I understand it. But should the Government have questions it believes the Court should present to the defendant, I think you should present those questions to me.

MR. CLEARY: We will, Your Honor. I think it preferable to do it in writing, is that correct?

THE COURT: Right.

MR. CLEARY: In order to guide what our suggestions are -- and I don't want to tread where I'm not wanted, but can I ask a couple of questions about what has happened in chambers over the last few hours?

THE COURT: Did you just ask a question?

MR. CLEARY: Well, was it about the scope of the defendant's concern with the representation by his counsel?

THE COURT: I am going to let the defense respond to your questions.

MR. DENVIR: Your Honor, we don't think it would be inappropriate for the Court to answer those questions or for us to go any further than we already have.

If the government feels that they have questions that would be helpful to the Court, they certainly can look at the record up to now and the record today and frame any questions and submit them to the Court. But we feel what was discussed, attorney-client matters, the Court has previously treated ex parte and confidential and should stay that way.

MR. CLEARY: It does make it a little difficult to advise the Court. Let me ask this. Is the discussion that happened today consistent with what the Court has previously disclosed vis-a-vis the prior ex parte conferences?

MR. DENVIR: We would answer that, Your Honor. It is consistent with the previous proceedings, we believe.

MR. CLEARY: That may give us a basis to provide some additional guidance to the Court, and we'll try to do that as soon as possible.

THE COURT: Based upon everything that has been stated, it is my impression that the Government desires the Court to have the jury here for the commencement of trial at 8:00 a.m. on Wednesday.

MR. CLEARY: If I may have one minute, Your Honor?

THE COURT: Yes.

MR. CLEARY: Your Honor, that is our request. However, just so the Court knows, for planning purposes, it's going to be the Government's request that this issue that has been discussed ex parte get firmly and finally resolved before this jury gets sworn.

Understanding that, and if the Court agrees with the Government's view, maybe it would be better to put it over until Thursday to give the Court and counsel and the Government a chance to resolve this with finality, if that's possible.

THE COURT: Defendant's response.

MR. DENVIR: We would agree with that, Your Honor.

THE COURT: As I understand the Government's position, the Government is asking that I wait until Thursday to bring the jury into the courtroom, and that on or before Wednesday, some type of assurance be provided to the Government that allows the Government to know that whatever issues have been resolved in the ex parte in camera communications are firmly and finally resolved.

MR. CLEARY: That's correct, for both phases of the trial, Your Honor.

THE COURT: Any response by the defense?

MR. DENVIR: No.

THE COURT: I will do the best I can. A criminal proceeding sometimes involves dynamics that a judge has to respond to. You do your best to make a decision that you think is right in the moment given the circumstances, and you hope that is a correct decision.

So I am a little concerned about your choice of words, but I understand your position about firmly and finally resolving something. But I will do my best to apprise the government and the public, to the extent I believe I can do so, of what the issues are, and then try to get the Government's input as to whether the Government is satisfied as to the resolution of those positions.

I think that's about all we should cover. If there's nothing further to cover, I'm going to adjourn.

MS. CLARKE: Thank you, Your Honor.

MR. DENVIR: Thank you, Your Honor.

MR. CLEARY: If I could ask. There is a bunch of legal issues that still need to be resolved. Do you want to resolve those now or wait until sometime prior to Thursday to resolve them? They have to do with various statements. We discussed this with the Court last week.

THE COURT: I am aware of the legal issues.

Let me get the defense's input.

MR. DENVIR: I think that given the nature of the problems, we ought to wait on that to see where we are. Meanwhile, I do intend to talk to the Government about the statements question. We may have a solution to part of that.

THE COURT: You heard what Mr. Denvir said.

MR. CLEARY: I did, Your Honor.

THE COURT: What is your response?

MR. CLEARY: Well, I can only tell you that the Government was prepared last week to argue this, we are prepared today to argue it. I can't really respond very well given that there was a reference to what's happened ex parte, so I really don't know how the respond. We leave it up to you, Your Honor.

THE COURT: I am prepared to decide, but I'm going to wait and get input from the parties before I render a decision. And in view of what the defense just stated, I think we'll wait until Thursday morning. I am willing to come in earlier, though. Maybe we should consider that.

Let me talk to the marshal.

(Short discussion off the record.)

MR. CLEARY: May I make a suggestion, Your Honor?

THE COURT: Yes.

MR. CLEARY: Since these issues relate in most instances to what the Government's going to be able to open on and what the defense is going to be able to open on, if it's at all possible with your schedule, could we come in and have the argument on Wednesday so we will have at least overnight to change our prospective openings if the Court rules in a way that will require us to change our opening, rather than doing it first thing in the morning and have to get right up and start opening to the jury?

THE COURT: Let me get the defense's input on that.

MR. DENVIR: Your Honor, if the Court wants to hear it late on Wednesday, we can do it Wednesday afternoon. We can see where we are at that point.

THE COURT: Is 1:00 o'clock late enough?

MR. CLEARY: Fine for the Government.

MR. DENVIR: We were thinking more about 4:00 o'clock to be sure we have all these matters resolved. I don't think it's going to be a lengthy argument.

THE COURT: 4:00 o'clock.

MR. CLEARY: Fine with the Government, Your Honor.

THE COURT: Okay. 4:00 o'clock Wednesday.

MR. DENVIR: Thank you, Your Honor.

MR. CLEARY: Thank you, Your Honor.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE GARLAND E. BURRELL, JR., JUDGE

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UNITED STATES OF AMERICA,)

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Plaintiff,)

)

vs.) No. Cr. S-96-259 GEB

)

THEODORE JOHN KACZYNSKI,)

)

Defendant.)

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